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Articles

The Balance of Power in the Law-Making Process in Romania between 1990 and 2018: Parliament vs. Government

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Abstract: The current article demonstrates how during transition from a totalitarian system to democracy in Romania, democracy could be shaken by the fact that the Government takes on Parliament's attributes regarding its powers to legislate. In other words, the Parliament becomes an "annex" of the Government. Normally, one could assume that, by virtue of the cooperation and solidarity between the Parliament and the Government, the more solid the parliamentary majority is, the less the Government would need to interfere with the law-making process of the Parliament. But the same solid majority in the Parliament could also be a guarantee that an Emergency Ordinance adopted by the government remains in force without even being democratically debated in the Parliament. The ordinances with potential to divide the society are not passed through the Parliament so that they cannot be challenged by the opposition or by the Presidency at the Constitutional Court. Thus, at the 28th anniversary of the transition of Romania from communism to democracy - we can observe an increase in government power in the field of direct regulation. The Parliament is also actively involved in this "game" by not contesting this transfer of duties. The paper analyses and compares the number of Emergency Ordinances and simple Ordinances adopted by the Government and the number of laws adopted by Parliament and the context in which they were passed.

Keywords: political power; law-making; GEO; Law-making; Democratization; Parliament; Government

1. Introduction

During twenty-eight years, Romania has gone through a difficult transition (Pasti, (1995), Barbu, (1999), Eyal, Szelenyi & Townsley, (2001), and others). As in any transition, "theories do not fit with practice" (Pasternak, 1957, p. 314), and laws are applied, many times, according to the power of understanding of those who have to

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apply them, and thus the legislator is often in the position to issue laws to solve one-off situations.

For twenty-eight years in Romania, laws were given according to the model of “fire-fighters”, that is, laws are given in order to eliminate certain punctual and individual conflicts and when the “fire” bursts elsewhere, another small correction is applied only in that field. Important and vast laws, such as the Laws of Justice or the Law of Education - could not be drafted, debated and voted by all the actors involved in the legislative process. Because visions were so different, because each side wanted something else and sought to maximize its benefits - they were given by assuming responsibility.

However, these laws of accountability of the governments have become, over the last years, a reason and a good justification when the new Governments handed over other GEOs that radically changed them.

The Law on National Education, which entered into force in 2011 was modified until the summer of 2018 by means of more than 60 GEOs comprising over one third of article changes.

The debates in the Parliament involved the Ordinances, not the initiatives of the Members of Parliament. The debates were not concluded in view to coincide with the interests of all actors involved (Antonovici, 2017). In the last seven years, the practice of “assuming” some laws in Parliament was forgotten. However, the government has made an excess of power and turned Romania into a country in which extreme, emergency and crisis situations were happening almost every week, if not even every day. This is the only conclusion to be drawn if we look at the number of situations in which the Government adopted an Emergency Ordinance. These GEOs must only be given in emergency situations, but they have become a habit for post-communist governments. This practice is a democratic one at its core, but if a Government abuses, it is moving further away from democracy, because it restricts the access of other actors (opposition, civil society, social partners, trade unions, media, etc.) to actively contribute to the adoption of a law. For example, the emergency of such measures was justified by Romania’s membership to NATO or the EU.

As the Parliament could not mobilize to approve certain laws that had to be put in accordance with the international law, the Government was the one who, through the GEO, “solved” the problem.

Despite all these, we must ask ourselves how many compromises democracy can accept.

Shortening the road of a law by approving a GEO would turn the Parliament into an institution for mere embellishment?

The paradox is that the stronger the parliamentary majority is, the more “courage” the Government has to adopt a GEO.

Thus, the parliamentary opposition is no longer allowed to come up with criticism and amendments to a particular bill before it produces its effects.

We must also keep in mind that after the Romanian revolutionary moment of December 1989 there was a real need in Romania to quickly adopt a new law and then there was the need to adapt the Romanian legislation to *acquis communautaire* for the integration of the country in the European Union.

All these realities created the “super-power” of the Government in terms of legislation by simple ordinances or emergency ordinances.

Therefore, with every taken right certain (electoral and legal) responsibilities arise as well.

Thus, during the last twenty-eight years, the Parliament was only called to transform this kind of initiatives into ordinary laws (Catrina, 2009, p. 53).

2. The Limits of Political Power in Romania from an Institutional and Legal Point of View

2.1. Who are the Legislators in Romania According to the Constitution?

According to Article 74, paragraph 1 of the Romanian Constitution, the legislative initiative shall, as the case may be, belong to the Government, Deputies, Senators or at least 100,000 of citizens with voting rights.

According to par. (3) the Government exercises its legislative initiative by transmitting the draft law to the competent chamber to adopt it as the first notified chamber.

Article 115, paragraph (4) clearly states that “the Government may adopt Emergency Ordinances only in exceptional situations whose regulation cannot be postponed, having the obligation to motivate the emergency within their contents.”

The Emergency Ordinance enters into force only after being debated in emergency procedure at the competent chamber of the Parliament and after its publication in the Official Journal of Romania.

Thus, a GEO can come into effect in just a few days or hours. The ordinance produces effects as soon as the above conditions are met.

Normally, a legislative initiative has a difficult journey until it becomes law. Sometimes it can pass even a year until it finally becomes law.

I shall only mention a few steps until it is promulgated: public debate, receiving opinions from the Legislative Council and the Economic and Social Council, debates in the specialized commissions of the Parliament, debates and votes in the committees of the two chambers etc.)

The Conditions for Adopting an Ordinance, According to the Constitution, are:

a. The existence of an extraordinary situation - the existence of an objective, measurable situation that is independent of the Government's will and that is endangering the public interest (Decision No. 1008 of 7 July 2009 of the Constitutional Court).

The extraordinary reasons that justify the issuance of the GEO must be assessed according to the time of the issuance and not depending on factors that occur at a moment later in time.

b. The existence of an emergency and its motivation included in the GEO

(to exist and to be described as specifically those situations listed in the Preamble to the Emergency Ordinance and its substantiation and explanation on why these circumstances constitute an emergency).

According to the Decision no. 421 of 9 May 2007 of the Constitutional Court, "the emergency of the regulation is not equivalent to the existence of the extraordinary situation, the operative regulation can be achieved by the way of the ordinary legislative procedure".

c. It cannot be postponed - not to be confused with the extraordinary situation, and thanks its exceptional circumstances, the situation requires the adoption of immediate solutions in view of avoiding serious harm to the public interest.

2.2. Who Legalizes de Facto in Romania?

Taking into account the legal provisions on the attributions of each institution regarding legislation, we would expect that the number of Emergency Ordinances and Government Ordinances is very small compared to the number of laws. These should only be given in “emergency” situations or during parliamentary holidays. The reality however is very different: one third of the laws published in the Official Journal of Romania are Ordinances and Emergency Ordinances.

Table 1. The total number of GEOs and GOs approved by the Government in comparison with the number total of Laws between 1990 and 2018¹

The total number of GEOs and GOs adopted by the Government	4668
The total number of laws adopted by the Parliament	8952

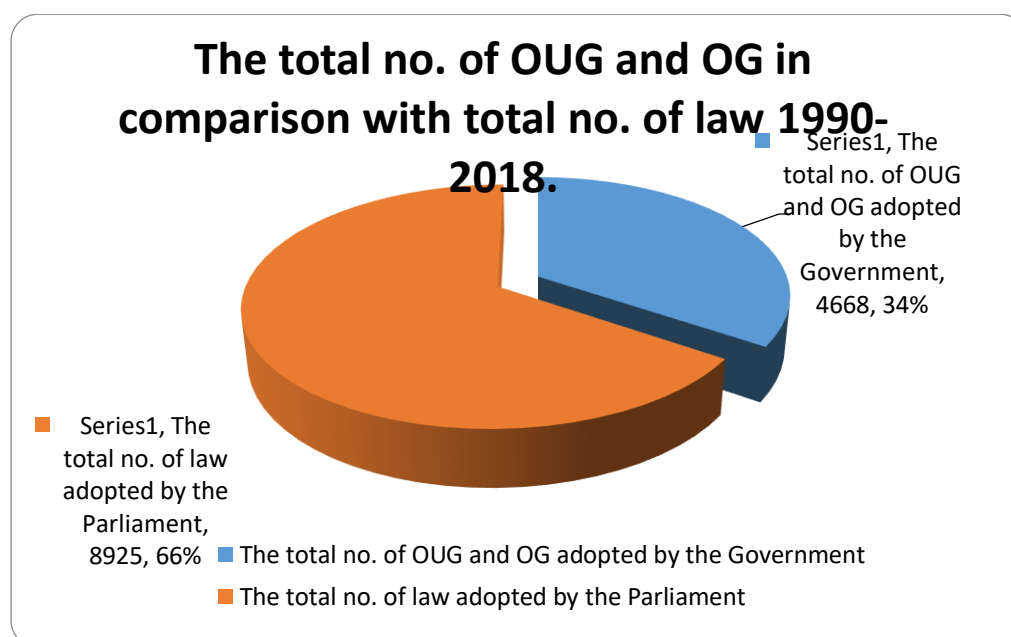


Figure 1. The proportion of GEOs and GOs vs. number of LAWS between 1990 and 2018

It is worth mentioning that for 2018 we centralized the data before 9.11. 2018.

¹ All data has been centralized and analysed by the author.

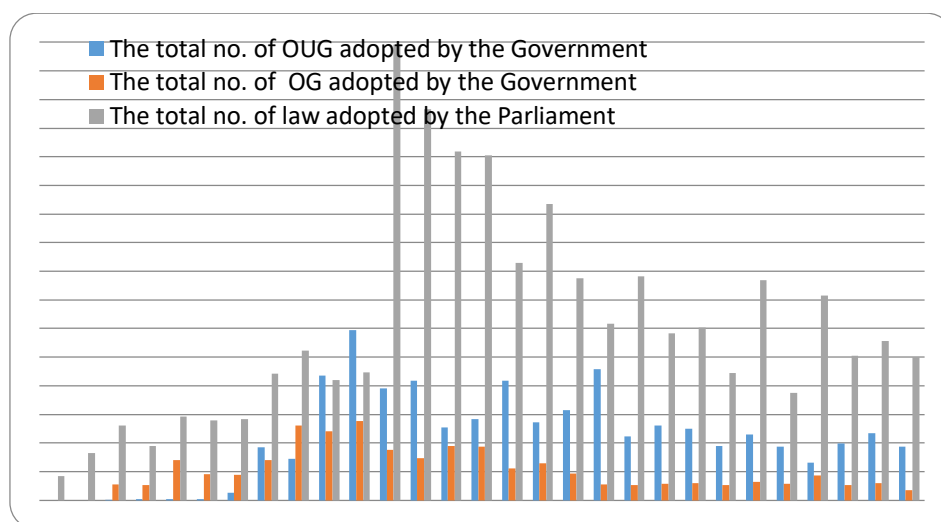


Figure 2. The proportion of GEOs, GOs and number of LAWS for each year

If we add the number of GEOs to the number of GOs we shall see that in 1999 and 2000, their number has exceeded the number of laws passed by Parliament.

A first assumption would be that the Government was more active or even more authoritarian.

The reality however is that the Government has bypassed Parliament in view to impose its own legislative changes.

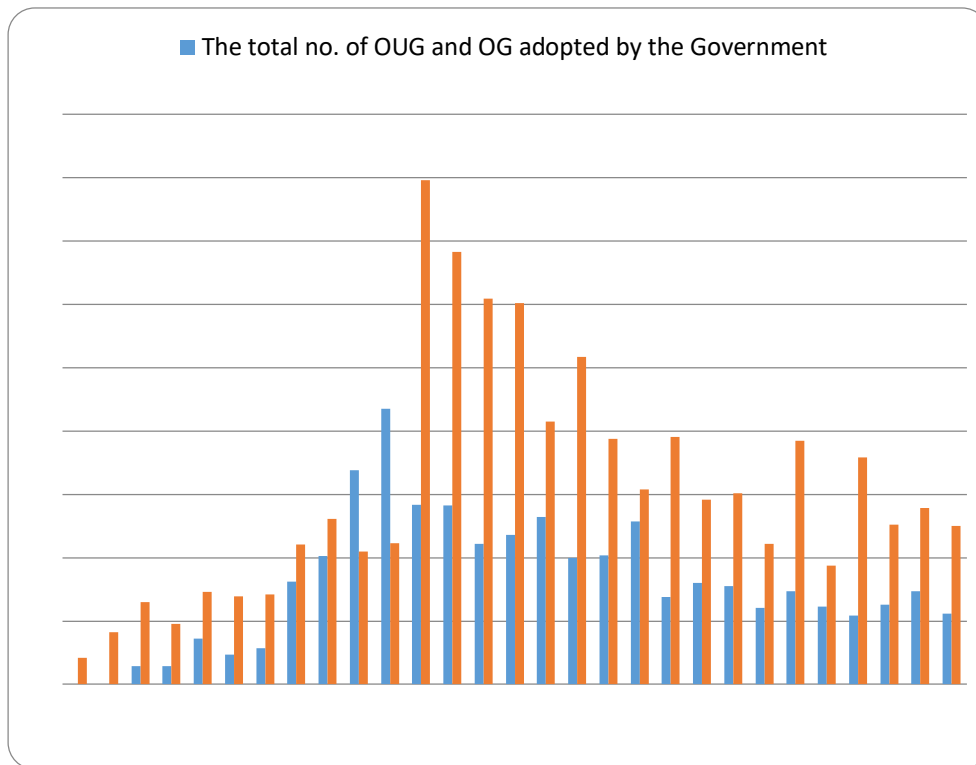


Figure 3. Number of GEOs and GOs vs. number of LAWS between 1990 and 2018

According to the above chart, we should keep in mind that some governments have turned to a “new strategy”, which I shall call the “matrioșka ordinance”. It’s about an ordinance that can change dozens of different laws but still counts as an ordinance. It is a strategy to hide the large number of legislative interventions through a single GEO.

With this artifice, the Government has avoided the critics of the civil society regarding the large number of approved EGOs.

The large number of ordinances issued by the Romanian Governments was highlighted either by press¹ or by civil society representatives.

¹ They were publishing an interesting title from the publication Romania Liberă, from 28.07.2014: Romania, in an emergency? Ponta gave an ordinance every 72 hours, accessed on 30.08.2018 - <https://romaniailibera.ro/special/dezvaluiri/romania--sub-stare-de-urgenta--ponta-a-dat-o-ordonanta-la-fiecare-72-de-ore-344443>.

For example, the “Capital” wrote on December 28, 2017: “EXCLUSIVELY Romania, governed by “EMERGENCY”: Tudose, the Prime Minister with the most emergency ordinances issued in the last 10 years”¹.

The article drew attention to the fact that “the Romanian Government has issued nearly 1,000 Emergency Ordinances in the last 10 years, which means that our country was in a constant exceptional situation, considering that at least two emergency ordinances have been issued weekly”.

The publication mentions that an average, over the last ten years analysed, would look as follows: an ordinance of emergency was issued every three days. This would prove that Romania was in a permanent position of exceptional situations or crisis.

The question is - whose crisis? Of the Government? Of the Parliament? Or of the country’s socio-economic situation?

Orders should be adopted in extraordinary situations whose regulations cannot be postponed. The logical question is: who actually has the power in Romania? And this can only be found out by knowing who has the power to enforce certain laws.

If the parliamentary majority has full control over all MPs and the Government, which it votes and supports, it can pass certain legislative initiatives in an emergency procedure through the Parliament.

Thus, a legislative initiative can become law in only a few months: all the procedures are hurried, it goes at the top of the list of priorities and it appears faster on the agenda.

The voted initiative may also be appealed to the RCC by the parliamentary opposition (if it manages to collect a certain number of signatures from Members of Parliament and draft a referral) or be turned for re-examination by the Presidency or it can even be attacked by the President of the Republic to the RCC.

(2) If the parliamentary majority is fragile and does not have real power (meaning real authority) over the Government - the latter will impose its own visions through the GEOs.

They enter into force shortly after being published in the Journal of Romania of Romania. Practically, they become applicable laws in a few days without a

¹ <https://www.capital.ro/exclusiv-romania-guvernata-de-urgenta-tudose-premierul-urgenta.html>, accessed on 26.07.2018.

parliamentary debate ahead. The parliamentary debate can take place after they have already produced their effects.

Most of the time, they pass silently by the first decision-making chamber (without debate), and are postponed for debate in the second chamber if they are expected to have a great potential for public scandal.

There is the case of GOs that have done their effect, the laws they have modified have long been abrogated, and still, they have not yet completed their parliamentary path. This technique was used by Governments when important changes to laws were passed and they did not want to get involved in a real debate.

It should be noted that while the draft laws can be attacked at the RCC before they come into force and before they can produce any real effects, the GEOs can only be attacked by the Ombudsman, but only after they have been approved by the Government, that is, after they have entered into force! And this is extremely rare. Often, the Ombudsman is of the same political colour as the Government and “does not see the irregularities in the GEO”.

At the same time, the role of Members of Parliament in adopting laws is somehow misplaced. If a rigorous analysis is to be made, we could see that the opposition cannot pass more than 10% of its proposed projects while the majority 20%. Deputies and senators also become “instruments” in the hands of the Government and the parliamentary majority holding the power to vote on government priorities.

3 The game of Institutions that Genuinely have the Legislative Power in Romania

When we talk about power in social sciences we talk about “the ability of individuals or groups to impose their own interests and concerns, even when others oppose” (Giddens, 2000, pp. 369-369). In this context, governments and the parliamentary majority are the ones who have the necessary tools in light to impose their own vision.

The first instrument of the two entities is the “Governance Program”. It becomes a law when investing the Government and it is supposed to be the common purpose towards which the Government and the Parliament will work. However, the entire governance program may also become the reason for which the Government will use

its own attributes to invoke the “emergency” in adopting certain legislative acts, leaping over Parliament.

They can always say they have resorted to the Emergency Ordinances to fulfil the promises of that program, as the Government has been voted by the parliamentary majority and also benefits from the majority’s “legitimacy” in Parliament. In this case, we can talk about a government that has the power to “do”, to achieve some results and the power of Parliament “on” (Boudon, 2005, p. 231) of the same Government.

It is interesting to see if the power of Parliament is a “coercive” or “consensual” one as defined by Friedrich or Locke (apud Boudon, 2005, p. 235). On the other hand, there is no power without resources.

If the Government has resources to fulfil the promises of the governance program, the parliamentary majority has the power and tools to stop or encourage certain measures. Here we can talk about a balance of power. If the interests of the two powers do not overlap, one of them will have to give up and usually it will have to be the Government, because the Parliament has at any time an instrument to dismiss a government through a censure motion (In Romania there was a case - the Government of Grindeanu- when the parliamentary majority resigned its own government through a motion of censure). This type of conflict between the parliamentary majority and the head of the government is more likely to occur when the prime minister is different from the head of the party.

Whenever there is a “conflict” (in the sense of Lukes apud Boudon, 2005, p. 239), either between the Government and the parliamentary majority, or between the Power (composed of the Government and the parliamentary majority) and the opposition or civil society or between the party head (the parliamentary majority) and the government - the one that settles the score is the parliamentary majority in the upcoming elections.

Law-making is a challenge for the coalition (Lanny, 2004, p. 457), especially if it is a fragile one. Ordinances and draft laws are negotiated for a long time and are placed on the public agenda only after there is a consensus within the majority. Law making inherently involves cooperation and compromise by parties with divergent political objectives in certain situations.

As we know, according to most theories of political science and sociology, any political power needs “legitimacy”. The first step is the popular vote, then the

fulfilment of promises in the electoral campaign and again the approval of the population by vote or other forms of support or rejection (such as polls, public support/protests). Any Government needs support from the parliamentary majority. Firstly, for the government's investment vote and then votes to support the Government in any simple motion or censorship motion. Whenever losing the support of the parliamentary majority, the Government may be dismissed.

That is why there is a need for a balance in the exercise of power and a continuous negotiation with the Members of Parliament from the governmental arch. As we see in the above tables, all governments have turned to Emergency Ordinances.

If in the early 1990s they were more reluctant because of the totalitarian past, with the passing of the years they have learned to impose their own projects through Emergency Ordinances. This gave them two major advantages in the front of opposition: they applied immediately and they were very difficult to challenge.

In addition, they assumed a public policy in its entirety. The opposition could not say that it was a joint effort, that they worked in Parliament and gave a good law. The only possible option of the opposition was to challenge those public policies from the point of view of communication as abusive, bad or undemocratic.

4. Conclusions

As we have seen, taking into account the social and economic changes at national and international level, Romania needed an instrument through which legislation could change more quickly. Thus, Emergency Ordinances and (simple) Government Ordinances have been transformed from "crisis/exceptional instruments" into "force/ordinary" instruments. As a result, the Parliament's attributions regarding legislation have been emptied of content.

In a real and very objective way, in a country that relies strictly on democratic values and not on the interest of ruling parties, the GEOs would only be used in emergency situations. In other words, the GOs should only be used when the Parliament is unable to legislate. It can be the case when there are extreme situations or when the Parliament is dissolved.

In all other cases, the Parliament may adopt, by means of emergency procedures any laws it wants. It is true that it will not enter into force in a few days, but within a few months any legislative initiative can become law. At the same time, the Government

also has other instruments provided by the law to solve finance or funding problems for certain projects, such as GHGs. In order to try to re-enact parliamentary attribution, the political class could take into consideration amending the Constitution in order to eliminate the possibility for Governments to approve the EGOs. The Romanian society is probably not ready for such a challenge at this moment.

In addition, if all parliamentary procedures were respected - in many cases - the Governance Program could not be fulfilled, and there would be other subjects on the public agenda, other than those related to Government actions. Elections for the Parliament are once every four years, which means that time is limited, and the parliamentary majority will not be able to give up an instrument that will allow it to change legislation in a less costly way as time and image.

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